EMPLOYMENT TRIBUNALS

Claimant: Ms S Jenkins

Respondent: Mr Matthew Harrison
Mr D Wood

HELD AT: Manchester **ON:** 6 & 7 September 2018

BEFORE: Employment Judge Holmes

REPRESENTATION:

Claimant: In person
First Respondent: Miss Smith, Counsel
Second & Third Respondents: Mr Braier, Counsel

JUDGMENT

It is the judgment of the Tribunal that:

1. The claimant's application to amend her claims against the first respondent is granted, to permit her to add a claim of unfair (constructive) dismissal, and further claims of discrimination, in accordance with paragraphs 36, 39 to 45, 47 to 62, 67 to 69 of her amended grounds of claim document.

2. The claimant's application to amend her claims against the second respondent is granted, to the extent that her claims of discrimination are amended, in accordance with paragraphs 3, 9 , and 31 of her amended grounds of claim.

3. The claimant's application to amend her claims against the third respondent is granted, to the extent that her claims of discrimination are amended, in accordance with paragraphs 22, 23, 24, 46 and 73 of her amended grounds of claim to include such claims , but only up until 16 February 2018.

4. All other amendment applications are dismissed.

5. The claimant's discrimination claims against the second respondent arising from matters alleged to have occurred on or about 9/10 December 2016 were

presented out of time, and the Tribunal has no jurisdiction to hear them. It would not be just and equitable to extend time for their presentation. They are dismissed.

6. The claimant's remaining claims against the second respondent have little reasonable prospect of success, and the Tribunal makes a deposit order in respect of those claims, set out in the separate Order sent to the parties with this judgment.

7. The application for a deposit order in respect of the claimant's claims against the third respondent is dismissed.

CASE MANAGEMENT ORDERS

The Tribunal further orders that:

1. The claimant do by **5 October 2018** provide to the third respondent and the Tribunal further particulars of :

   a) Each contact made , or attempted, by the claimant with the third respondent up until 16 February 2018 to which it is alleged he failed to respond;

   b) The date, or approximate date, of Jennie Duong's promotion.

2. The respondents have permission to amend their responses by **26 October 2018.**

3. There be disclosure by exchange of Lists of documents by **9 November 2018** with inspection by the provision of copy documents by **16 November 2018**.

4. The first respondent agrees to be responsible for the preparation of the hearing bundle the Index to which is to be agreed between the parties no later than **30 November 2018** , and copies of the bundle are to be provided to the parties by **7 December 2018.**

5. The parties shall agree a final List of Issues no later than **9 November 2018 ,** the first respondent preparing the first draft for agreement by the other parties.

6. There be exchange on the same day of witness statements of the parties and any witnesses upon whose testimony it is intended to rely at the final hearing by **1 February 2019**.

7. The claimant do by **4 March 2019** serve upon the respondents and the Tribunal an updated schedule of loss.

REASONS

1. The Tribunal has been considering over the last two days in this Preliminary Hearing issues which were identified in previous Preliminary Hearings held in this matter on 4 May 2018 and 15 June 2018. The claimant has appeared in person, and Mr Braier of Counsel has appeared for the second and third respondents, the first respondents have not been directly involved in the issues that the Tribunal has been determining , but initially , by Miss Smith of Counsel, appeared, and indeed re-appeared , in the hearing to deal with any consequential Case Management Orders that are necessary in relation to the claims against the first respondent. The issues to be determined in this particular part of the Preliminary Hearing relate only to the second and third respondents.

2. The parties have presented to the Tribunal a bundle of documents, a bundle of authorities for the respondent and indeed a further set of authorities. The claimant has given evidence, there has been a witness statement from the second respondent but he has not given live evidence, there has been a skeleton argument and indeed a response to that document prepared by the claimant. Subsequently the claimant has prepared written submissions, which she has made today to which she has spoken , and Mr Braier for the respondents has orally amplified his submissions. Having considered all those submissions and the evidence I have heard and the documents this is the judgment of the Tribunal upon the preliminary issues before it.

The claims as originally presented.

3. Those issues are , in relation to the claims that have been presented , issues of amendment and issues relating to time limits. The history of the claims is that a claim form was presented by the claimant on 20 February 2018, (it is actually referred to as 2 February in the index to the bundle but it is clearly the 20 February) and in that claim form the claimant brought complaints against all three respondents, the first respondent being previously , and indeed at the time of this claim being presented, her employer, the second respondent being the Chief Executive and the third the Head of the Transformation respectively as officers of that company. Those claims were of discrimination , and the relevant parts of the claim form were completed to indicate that the claims were of discrimination on the grounds of pregnancy and maternity , and of sex . Also the box for “other payments” was ticked. With the claim form, rather than completing box 8.2, the claimant submitted a document entitled “Grounds of claim” which is to be found at pages 13 to 19 of the hearing bundle today . That document is a professional looking document which has the bearing and hallmark of having been prepared by a qualified lawyer, and, as emerged in the course of the hearing , it was, or certainly there was some professional input into it. In this document, the grounds of claim were set out very cogently in numbered paragraphs. In relation to the first page there is, after a recital of the identity of the three respondents , a section headed “background” under which there were two paragraphs, 4 and 5. In respect of paragraph f5 there is a pleading of allegations in relation to the second respondent, and comments that he allegedly made in January 2015. That is , however, under the heading of “background”. Thereafter , and set out under the heading “second respondent’s behaviour”,

paragraph 7 onwards relates to an alleged incident on 10 December 2016 during a Christmas party , when allegations are made about the conduct of the second respondent , and in particular language that he used in terms of the claimant and other women . There is an allegation that he in fact assaulted , albeit by means of the use of a chair or a seat in a vehicle , but he came into contact with the claimant. Basically those paragraphs 7 through to 8 of the original grounds of claim pleaded behaviour on the part of the second respondent which subsequently, in the "prayers" that were then part of the pleading on page 18 of the bundle, in terms of the second respondent , the claims against him were set out at paragraphs 36 and 37 specifically. In relation to the first incident relied upon it is that of the 10 December 2016 which is alleged to have amounted to less favourable treatment on the grounds of the claimant's sex and/or pregnancy or maternity i.e. a direct discrimination claim under Section 13 of the Equality Act, and harassment on the same grounds contrary to Section 18 of that Act.

4. The next paragraph, however, goes on to allege that the second respondent as the ultimate decision maker was believed by the claimant to have directed the first respondent in respect of matters that are pleaded against the first respondent. Those matters relate to the claimant's entitlement to maternity pay in circumstances where she had not one , but two, fairly quickly succeeding periods of maternity leave from the first respondent. The matters giving rise to those claims which are pursued against the first respondent are basically that, having been given the advantage of what the respondent regards as generous maternity pay provisions in respect of her first maternity period , subsequently when she was about to embark on her second period of maternity leave, the first respondent sought to recoup payments made in respect of the first period , in or about September of 2017. That forms the basis of claims that the claimant makes against the first respondent. In terms of the second respondent , however, in paragraph 37 of the original claims she contends that the first respondent as "the ultimate decision maker" directed the first respondent to act in that manner , and consequently alleges that he thereby discriminated against her, either directly pursuant to Section 13, victimised her pursuant to Section 27 and/or harassed her. That second set of claims at paragraph 37 is linked to the allegations and the claims against the first respondent , whereas the first claims at paragraph 46 are made against the second respondent , and against him only.

5. In terms of the third respondent the factual allegations against him at that time were contained in the grounds of claim, and relate to his alleged failures to communicate with the claimant, he being appointed as her line manager during 2017, and having in fact relatively little direct contact with her, because she had been on one period of maternity leave , and then started what turned into another. The factual allegations against him in the grounds of claims as originally pleaded relate to alleged lack of communication in relation to his position as her line manager , and consequently , in terms of the claims that are made against him on page 19 of the bundle the claims are put as follows. In failing to engage with the claimant from the time at which he became her line manager, continuously ignoring her, cutting her out of team activities, failing to inform her of important changes to her employment and refusing to treat her fairly, the claimant claims that the third respondent has directly discriminated against her because of her pregnancy or maternity , or that he thereby harassed her on the same grounds.

6. The claimant did in the concluding paragraph of the grounds reserve the right to amend the claims should further claims arise but those were the claims are originally pleaded.

The procedural history.

7. In terms of the procedure thereafter , all respondents entered responses. In terms of the first respondent those were, as it were, substantive, and took a number of points , but dealt with the factual allegations particularly in relation to what I am going to term the OMP (the maternity pay recoupment attempt) matter which is the maternity pay issue , and that was pleaded too.

8. In relation to the second and the third respondents , however, who are separately , but jointly with each other, represented , their responses effectively took the points that the claims against them were out of time , initially and although there was then some response to the merits of the claim against the second respondent in relation to the OMP matter, both responses effectively took the time limit points contending that the claims against the respective respondents as individuals were out of time.

9. Thus it was that there were two Preliminary Hearings , as I have described , at which these issues were identified. Indeed after the first one on 4 May 2018 it was anticipated there would be a further Preliminary Hearing on 15 June to determine these various preliminary issues. However in the meantime there were some developments because the claimant, by a letter which ultimately seems to have been received or accepted on or about 12 April 2018, resigned from her employment with the first respondent.

10. Further by letters of 25 April 2018 the respondents' (in the sense of the second and third respondents) solicitors indicated that they would be making applications to , as it was put at the time, strike out the claimant's claims in relation to time limits. Hence it was that when the matters came before the Tribunal on 4 May 2018 , there were the potential applications which were then put on to the 15 June hearing . Given that the claimant had in the intervening period resigned , and had sought by a letter to the Tribunal to amend her claims to include a complaint of unfair dismissal , in the form of constructive unfair dismissal, against the first respondent she indicated that that would be an application that she wished to make , and that was in fact made at the Preliminary Hearing, with the result that she was then directed to provide a fully pleaded amended grounds of claim. She subsequently did so, which then the respondents were invited to comment upon with the result that they indicated opposition to the amendments that the claimant sought.

11. As I say originally there was to be a hearing on 15 June 2018, in relation to that but that then became this two-day hearing , listed and dealt with yesterday and today.

The amendment and other applications.

12. In the meantime, the first respondents did not oppose the amendments, insofar as they related to them , and as they have no applications to make to the

Tribunal , that is the reason why they have not participated in this hearing. This hearing , however, has after some clarification been held to determine:

The claimant's application to amend her claims against the second and the third respondents; and

The second and third respondents' applications (separately in effect from the amendment application, but ultimately to be linked with them) to determine that the claims against each of them were presented out of time , and that the Tribunal should not extend time for their presentation, and hence should determine that it has no jurisdiction to consider the claims against the second or third respondents.

13. In the alternative the second and third respondents seek Deposit Orders in respect of those claims that are maintained against them, either by way of amendment or by way of original claim , and consequently that has been a further application the Tribunal has considered so that is how the Tribunal comes to consideration of the matters before it, and the various applications and cross applications that it has had to consider.

14. I have indicated , in doing so it has had the benefit of a number of documents in the bundle, submissions, and the evidence particularly of the claimant which has been cross examined upon ,but only in relation to the matters before the Tribunal, Mr Braier for the respondents , of course, not cross examining on the rest of the witness statement , which in fact goes wider than just those issues before the Tribunal today. The Tribunal will not be determining questions of fact that are for ultimately a final hearing , which I should observe, is nonetheless listed in any event because of the claims that will nonetheless proceed against the first respondent, and which is listed for March of next year.

15. In terms of the applications before the Tribunal the submission was made, and the Tribunal agreed and I think the claimant probably agreed as well, that the correct order in which they should be considered is the claimant's applications to amend, the respondent's applications in the claims , either as amended or as originally postulated , for orders that the claims should not proceed as being out of time , the Tribunal having no jurisdiction to entertain them, and then, in the light of any judgments made in respect of those applications, to consider the Deposit Order applications that have been made . That is the order that the Tribunal indeed will proceed.

The amendment applications.

16. In terms of the applications to amend, the claimant formally made the application by a letter to the Tribunal of 3 June 2018, but that was not originally in the bundle , but has now been added to it . With that document she submitted a further grounds of complaint , and the Tribunal has considered that as the draft amendment which is to be found at page 20 onwards of the bundle, the draft amendments being in bold type , which has come out reasonably well in the photocopying. It is not quite as clear as it is in the original but to the extent that the claimant seeks to amend her proposed amendment are in bold on that document.

17. In terms of the covering letter what she said in that letter was this:-

"Dear Sir/Madam

I would be grateful if you would put before a Judge my request for permission to amend this claim the amendments are detailed in bold italics for ease of reading, the amendments are summarised as and then she has four bullet points

- *Amendments on points already made to provide clarity;*
- *Administrative changes;*
- *Further acts of discrimination occurring after submission of original ET1 on 20 February 2018;*
- *Reasons for constructive unfair dismissal claim.*

She then continues:

"The amendments were not included in the original ET1 because I was awaiting the outcome of a grievance appeal, the purpose of this amount is to clarify the issues between the parties, the prejudice to myself and the refusal of the application and depriving me of part of this claim would be greater than any prejudice to the respondents flowing from permitting the amendment".

This letter was copied to the respondents' representatives, and she then appended to that the draft amendments, with the highlighted and bold type showing what she was seeking to largely add, (although there were a couple of deletions but there are the consequential upon changes the claimant wished to make). In terms of those proposed amendments many of them related to the information that the claimant had discovered as a result of a Subject Access Request , and indeed to incorporate her subsequent resignation and claim for constructive unfair dismissal. A lot of the matters that she set out in this document were as a result of those discoveries and the need to update her claim to reflect the fact that she had since resigned.

18. In relation to the two individual respondents the proposed amendments are, in relation to the third respondent, to add a paragraph 18 to plead that during her return i.e. her return to work between the two periods of leave the third respondent did not organise a risk assessment to discuss the impact of the claimant's high risk pregnancy, in paragraph 22 again she seeks to make amendments relating to the third respondent by referring to dates of the 8 June 2017 and 11 August 2017 , saying the claimant made regular contact with the third respondent via telephone and email to update on her pregnancy related illness but received "limited response" from the third respondent.

19. In relation to paragraph 23, the original paragraph is still there but has been added to , by giving some further details of a meeting on 11 August where she had some further details as to who was at it, and who did not attend, but she continues to seek to amend that paragraph by making reference to the third respondent not attending that meeting and what happened thereafter.

18. She then sought to amend in relation to paragraph 24 in these terms: "between 12 August 2017 and until the claimant's resignation on 6 April 2018 inclusive the third respondent failed to reply to the claimant's queries and did not communicate with her despite remaining her manager". Thereafter, at paragraph 46 she seeks to amend in relation to the third respondent, by pleading that between 12 August 2017 and her resignation on 6 April 2018 he remained her manager but did not respond to her multiple queries posed prior to and on 11 August, did not contact her to arrange contact during her maternity leave and/or inform her of promotional opportunities on the team. She adds the third respondent's conduct formed part of the claimant's grievance and appeal that were not upheld.

19. Thereafter, in terms of the third respondent the amendment that she seeks to make in respect of the claims against him are in relation to paragraph 73, where she sought to add the words "up until her resignation on 6 April 2018" to the wording in paragraph 73 that was originally in the claim.

20. In terms of the second respondent the amendments in respect of him were to plead specifically in the claims against him because paragraph 5 of the grounds of claim was left intact, but the claimant sought to amend in relation to the claims against the second respondent, at paragraph 70 , that the treatment of her in January 2015 i.e. that already pleaded in paragraph 5 constituted either direct discrimination or harassment . The remaining claims continue, save that she seeks to amend paragraph 72 to add an allegation that the second respondent directly managed the third respondent and the HR Director, which was a further detail in relation to the claims that she had already made in relation to the second respondent's responsibility for the OMP matter.

21. So , in terms of the proposed amendments , those are they, as far as these respondents are concerned , and objection is taken to them by those respondents, not least of all on the basis that they seek to introduce claims that are considerably out of time , and that, of course, also is echoed in the applications the respondents are in any event to make in respect of the existing claims in respect of which (save for the OMP matter against the second respondent) the respondents would be contending that the claims as originally framed were out of time in any event.

22. In terms of the amendments that is a summary of the amendments that are sought and which are opposed. In terms of the other applications, and as I have indicated the original claims are said to be out of time , the respondents seek determination of those , and in relation to the other claims against them they seek deposit orders and consequently it is against that background that I have heard the submissions and considered the evidence and the documents.

Discussion and Findings on the applications to amend.

(i)Amendment in relation to the second respondent.

23. Dealing with the applications to amend, the law has been summarised by Mr Braier and although the claimant at one point was concerned that she may be disadvantaged . She indeed prepared "complaint" document that I have seen in

relation to being provided with skeleton arguments and authorities at short notice which appears to have happened in relation to the previous hearing, but perhaps less so for this one. In any event, the law has been set out in a number of cases and in Mr Braier's skeleton argument , but the claimant has been assured that ultimately matters of law are for the Tribunal , and that if Mr Braier's submissions are incorrect in law they will be corrected . The authorities that he puts forward are matters for me to consider , and to apply the principles in those authorities, or any others that I think are more appropriate , so the claimant need have no concerns on that score. Indeed the claimant , regardless of the difficulties that she felt under, was able before the hearing started to submit a considerable document of response, and (helpfully in green ink to differentiate it from the original skeleton that was provided to her by Mr Braier) , which I have considered. She was able to do that , and having had the benefit of an adjournment overnight to prepare her submissions, she has prepared a further submissions document today , which is similarly very full, and sets out very fully her case in relation to the amendments, the time limits and the deposit issues.

24. So I have taken all those into account , but ultimately as far as the law is concerned on amendment , it has been well settled for many years and is indeed to be found in a case which is growing in antiquity, but no less so in authority by dint of its age called ***Selkent*** (full citation ***Selkent Bus Co Ltd v Moore [1996] IRLR 661, [1996] ICR 836***,) in which the court set out well established principles now that should be applied in relation to applications to amend, it being the case, (as it has been for many years under all of the Tribunal's rules however much may have changed but this has not changed), that basically the matter of amendment is a matter for discretion for the Tribunal . What the ***Selkent*** case did , and has been approved countless times by the EAT in the Court of Appeal , and possibly even higher , that the formulation has been approved of the test that should be applied. That is set out in the judgment of what was then Mr Justice Mummery, in his judgment , where he gives guidance , and that is what this is, to the Tribunal as to how it should exercise its discretion , and what it should take into account which is all the circumstances of an application to amend , and how it should balance the injustice and hardship of allowing the amendment against the injustice and hardship of refusing it. This indeed is rather echoed in the wording of the claimant's actual application to the Tribunal of 3 June.

25. In terms of the relevant circumstances, he asks in the course of the judgment "what are the relevant circumstances?", but goes on to say it is impossible and undesirable to attempt to list them exhaustively, but the following are certainly relevant. First is the nature of the amendment, the second is the applicability of time limits and the third is the timing and manner of application . Each of those paragraphs he expands upon , in various aspects , but he ends the third paragraph, the one headed "the timing and manner of the application", as follows "whenever taking any factors into account the paramount considerations are the relative injustice and hardship involved in refusing or granting an amendment, questions of delay as a result of adjournment and additional costs, particularly if they were likely to be covered by the successful party are relevant in reaching a decision" but that has long been the basis upon which Tribunals approached this task, and it is the basis upon which I shall approach it today.

26. The applicability of time limits has always been a significant factor in amendments, and in terms of how they are factored in, if the claim is to be amended but the amendment would have been in time if included in the claim originally, then that is obviously a persuasive but not definitive argument for allowing the amendment. Conversely the mere fact that an amendment would be out of time and so Mr Justice Mummery makes clear, and countless other authorities have done since , that is not a reason in itself for not granting an amendment. It has been said that , in terms of weighing up the justice or injustice of allowing a refusal and amendment, if a claim had been presented with the original claim and would itself have been out of time a claimant, who loses the benefit of an amendment in those circumstances loses nothing that they would not otherwise have had. This is because if the claim had been originally included, but was out of time , and was subject then to the Tribunal finding it had no jurisdiction , then an amendment can put a claimant or should put a claimant in no better position than they would have been if they included that claim in the first place. Certainly the applicability of time limits is thus a highly relevant consideration in terms of whether or not to grant the application.

27. In terms of the timing and manner of the application, of course in this case the timing is the 3 June 2018, that is when the application was formally made to the Tribunal. It is appreciated as far as the unfair dismissal claims are concerned that that application, as far as the first respondent is concerned, is earlier than that but in terms of these applications relating to the second and third respondents only the formal application was received by the Tribunal on 3 June 2018.

28. In terms of the nature of the amendments , as has been observed in the course of the argument , in some cases it may be said that these are no more than further details of existing claims, sometimes it is put that they are “labelling” or “re-labelling” of existing claims, but in other instances they may be new claims particularly if they allege new facts. So one has to look at the particular amendments in each case and decide which category they fall into.

29. In terms of the second respondent, that is probably the best place to start in terms of the order of consideration. The proposed amendments in his case relate to the proposal to add , as a claim, the events of January 2015. In terms of the facts that have been alleged therefore, it is right, as the claimant points out, that these have always been pleaded, as they were originally in paragraph 5 of the grounds of her claim . It was always pleaded that the events of January 2015 occurred and there has been no change to that. The proposed amendment , however, is to go further than that, and to move that factual matrix from “background” where it presently sits in the original claim , and to make it an actual specific claim against the second respondent. That submits Mr Braier makes it a new claim, notwithstanding that the facts have been pleaded before , but it is a new claim and therefore the Tribunal should approach it in that way. The claimant argues, or would argue, that while the facts were originally pleaded and so there is no prejudice to the second respondent, he has known certainly since the claim was originally presented that those allegations were being made against him , and if they were not claims as such then that does not prejudice him, they were things that he was aware of from the original pleading , and factually should have been in a position to deal with.

30. In terms of this, the timing of the application, of course, is 3 June 2018 but in terms of whether or not these claims have been previously raised before the original pleading , which itself was 20 February 2018, the respondents make the point that these allegations, the factual allegations , let alone any claim relating to them, were not actually made until the 16 February 2018 , and that the claimant does not dispute. The relevant history is that, after the first respondent informed the claimant in September 2017 that it would be reclaiming, or seeking to reclaim the additional payments of maternity pay that she had received previously, the claimant then responded to that indication, first of all by an email of 29 September 2017 at page 77Z of the bundle ZA , but thereafter by a lengthy email of 14 November 2017 which was treated as , and indeed concludes with wording that suggests that it was indeed, a formal grievance. Although it is headed "Revised OMP Proposal Response" it was clearly more than just a response to that , because in the body of that document the claimant makes a number of complaints and raises a number of issues, many of which in fact relate to the third respondent, and the period of her return to work between 5 and 8 June 2017 . A number of questions that were raised in relation to that period, to which I will come to in due course, but that is a document that was dealt with ultimately as her grievance. It is observed by the respondents that nowhere in that document is any reference made to the matters alleged against the second respondent of January 2015. Indeed the first time that occurs is when, having been through that grievance process, the result was a negative outcome for the claimant . The Tribunal has not got this before it, but it was subsequently the subject of either an appeal or a further grievance . It resulted in an appeal letter of 16 February 2018 , which is at page 119A of the bundle, and it was in the body of that document that the claimant made reference, and the respondents say for the first time , and she would accept that this was for the first time formally, to the alleged events of January 2015 in relation to the second respondent.

31. Indeed that is at page 119E , where at paragraph 34 headed "ongoing treatment by Matthew Harrison" she sets out what then she wishes to allege, and in terms of that paragraph it is perhaps relevant to recite paragraph 34 in which she says this:-

"I believe it is reasonable to assume that Mathew Harrison will be responsible for signing off the proposals Great Places have made in my case. I have continued to contest these decisions made against myself as detailed in my initial grievance and during my grievance hearing. It's my belief that his motivation for making these decisions has not come from a place of impartial leadership but with the aim to victimise me and force me to leave Great Places. I believe this is in retaliation [sc. "for"*] prior incidents that were reported to Alison Folkes and subsequently Nicola Parkinson and Matthew Harrison. Below I will give details of these incidents".*

32. Then she goes on at paragraph 35 to say this:

"In January 2015, Matthew Harrison had recently been appointed to the Director of Chief Executive Department, the department I was a part of. During a Team Away Day the following incident occurred"

Then she sets out an incident that originally had its roots in the Christmas Party of 2014, but which in fact was the incident that she relies upon in January 2015 in

which she alleges that he made a remark that she had been working the room at the Christmas Party “like a true slut” , and that of course is the allegation referred to in paragraph 5 of the original grounds of complaint. That is the allegation the claimant seeks to bring by way of a further claim by way of amendment , but that is where it first is set out.

33. That was then investigated ,and the Tribunal has heard some details of an investigation into that allegation, Mr Harrison was asked about it, as were others and indeed Mr Harrison has made a written statement before the Tribunal about it. He sets out what he can and cannot remember, and what he would say about it, but the first time that it was raised by the claimant formally was in this document .

34. The result of the claimant’s appeal ultimately was a report by an HR Consultant which is to be found at the end of the bundle, a Sharon Griffiths. That report starts at 144 , and involves investigations into this and indeed many other matters, and again we will come to those further in due course. In terms of the application to amend , the second respondent’s position is “well this was the first time the claimant had formally raised this and consequently it was the first opportunity that the second respondent had to deal with it.” That no one knew about it other than (and this is accepted for these purposes) that the claimant verbally made a comment at the time to Alison Folkes, who was her then Line Manager. But she went no further with it, and consequently this was the first formal notification of that grievance.

35. So, submit the respondents this claim is out of time, it is considerably out of time, because going back to January 2015 it is some three years, in fact longer than that since the event , and allowing for the ordinary three-month time limit for discrimination and claims of this nature , on any view it was first raised more than three years not three months after the incident. Consequently the respondents submit this is a very good reason for the application not being granted.

36. In terms of the timing of the application , and why the claimant did not in the original claim include this as a claim, and just not as a background allegation, the claimant has explained in her evidence , and in her submissions, how when she completed the claim form and the grounds of claim , whilst unrepresented as she is today and has been throughout the proceedings, she did nonetheless have the assistance of a lawyer from an organisation called Working Families. She also had assistance from a solicitor who was a friend of her husband’s, and that would explain, as is clear to anyone who reads the grounds of claim, the legalistic and professional way in which that document has come to be drafted. But in terms of the claims that were made , she accepts that no claim was made about this incident in relation to the second respondent although , of course, it was set out in paragraph 5. The claimant has explained this in her submissions as a “clerical error” and has therefore invited the Tribunal to exercise its discretion to allow this amendment. She also contends that the respondents, and the second respondent in particular has now been asked about it, enquiries have been made, investigations have been held, various people have given various accounts and that if the second respondent is able to do that whilst on the one hand saying that he cannot remember, he nonetheless has put forward an explanation as to what he might have meant by any such comment, as an explanation if it did in fact happen. For all of those reasons,

given the facts were originally pleaded, and because she did not wish at the time as she explains to make it formal for reasons that she advanced , in terms of her relative juniority in the company and the position of the second respondent she did not want to take it further internally at the time, but submits, in essence , that it would be fair and just and equitable for the Tribunal to allow the amendment to include this claim at this stage, notwithstanding that it is late in the day.

37. In support of that , and perhaps in the alternative, she advances an argument, again as a lawyer perhaps would , that in any event this was part of a series of actions that constitute conduct extending over a period of time , which relates to a provision under Section 123(3) of the Equality Act 2010. Ordinarily the time limit in discrimination claims runs from the date when the act in question was done , (and this is an act and so indeed we need not consider omissions at the moment) but as these were definite acts , normally the period would be three months from the date of the alleged act. Where , however, there is, or may be, conduct extending over a period of time then the three month time limit can run, not from the beginning of that period from the first act but does not run until the last of those acts. So if it is arguable that there is a series of acts over a period of time, then, provided that the last act is in time, it is possible for a claimant to seek to rely upon earlier acts and to bring claims in respect of those acts, notwithstanding that they in fact were longer than three months before the claim form was presented . So the claimant argues that the Tribunal should regard this as part of a continuing act, relying as she then does upon the next claim, that of the 10 December 2016 , which , of course is pleaded in the original grounds of claim and which then ends with the OMP matters alleged against the second respondent , which are conceded to have been brought in time.

38. So the claimant seeks first of all the extension of time on the basis of continuing act , but in the alternative effectively invites , if the Tribunal is against her on that basis , to allow her the just and equitable extension for the reasons that she has put forward.

39. It is convenient perhaps to deal with each amendment in turn and I will do so in relation to this one and will consider the competing arguments. It is indeed clearly right that, leaving aside any issues of “continuing act” the claim in respect of the January 2015 allegations is very stale indeed. It was not raised formally until February 2018 over three years after it actually happened and on any view, it is a stale matter. It also is a matter which was relatively brief, and which would depend upon the oral recollection of any persons involved in it. One often sees discrimination claims , or other claims, where there was considerable documentation and it is very easy to see what happened, because that is all well documented on the papers before the Tribunal . But that is not the case here, because we are concerned with purely verbal incident that took place in a few moments in January 2015, so it would be a classic case where the Tribunal would have to determine matters on the recollection of parties and witnesses.

40. In those circumstances , of course, the passage of time becomes more important. Now whilst the claimant has sought to rely upon the continuing act issue with respect it seems to me that she has done so rather in a reverse fashion, when looking at the continuing act provisions one looks at the last one and then goes backward, one does not start at the first one, and go forward. So in this case the last

one is the OMP matter, which was in or about August/September 2017, that is preceded if anything by the December 2016 matter , and that is preceded by the January 2015 matter. The respondents , through Mr Braier, submit that that would be stretching the concept of acts extending over a period of time too far, and he cited the relevant case law as to how the Tribunal should approach this matter. Of course I would only have to be satisfied that such a course would be capable of constituting conduct extending over a period of time , but it seems to me that to do so would be stretching that concept too far. In terms of the acts there are allegedly three of them but the nature of the third in relation to the OMP matter is very different from either of the first two. Whilst taking the point that the claimant as a woman complains in relation to the OMP matter , that it is a pregnancy and maternity related matter as it clearly potentially is and clearly those matters are unique to the female sex, the allegations in relation to both the December 2016 and January 2015 incidents are wholly different in my view, they are classic instances of what one might term sexual harassment, they are potentially direct or harassment matters on the spur of the moment , conducted in a social context where the alleged perpetrator and the alleged victim have been together in certain circumstances, and things have allegedly been said or done.

41. The OMP matter however in mid-2017 is rather different, it was effected not by Mr Harrison directly in the sense of the decision being communicated to the claimant that was effected by a letter from Miss Costigan , if I remember rightly, it was a formal act, and although it is challenged and the claimant is free to challenge it but it was carried out in very different circumstances , and is a very different form of act to the two acts that the claimant refers to in relation to Mr Harrison's personal conduct. Yes, one can see that in relation to maternity and pregnancy , those are gender related, and it is possible to frame those claims in the same way, but in terms of the type of conduct alleged, it seems to me they are a world away in terms of the nature of the OMP matter and the two matters that the claimant alleges against Mr Harrison personally. Further, quite apart from the totally different nature of the character of the acts alleged , there is the considerable time gap between them, and given that we are going back potentially to January 2015 the gaps between these events are considerable , and it seems to me again stretching the concept of extending over a period of time when one takes two as I categorise them isolated incidents of alleged conduct by Mr Harrison in those circumstances and say that they are the same sort of conduct as is complained of in relation to the OMP matter. It is appreciated that the motivation for the second respondent's alleged involvement tin the OMP matter may well be discriminatory , but in terms of the form of conduct that is alleged against him in respect of the other two claims those seem to be to be so different , and extend over such a long period of time that it would be stretching the concept of Section 123(3) to find that they were capable of amounting to conduct extending over a period of time, and I do not so find.

42. So that then leaves the discretion, because having found that they cannot be saved (or that this application to amend cannot be saved) by dint of those provisions I then have to apply the discretion and the ***Selkent*** principles , and in relation to that, of course, the time factor is a relevant one, the claim in relation to January 2015 would have been out of time, even if included in the original claim form on the 20 February 2018. It would have been considerably out of time , and there would have been considerable passage of time between the events and the first complaint even

being made in the grievance appeal. Of course it is when the claim is made that is the important date , but it is legitimate for a Tribunal to take into account whether or not any complaints have been made, informally or otherwise before proceedings have started . It sometimes happens that although a formal claim is not made there has been a grievance raised within a reasonable time, people have had an opportunity to investigate it when matters were still fresh in their minds and the Tribunal can often be influenced by an early grievance to allow a claim which would otherwise have been out of time. But in this case the difficulty for the claimant is that that did not occur because there was no formal grievance about this matter until February 2018, as I say some three years after the events in any event. Clearly, in those circumstances while she did grieve before seeking to amend she did so at a time when those matters were already considerably stale . In terms of the test to be applied, as the recent case of ***Abertawe Bro Morgannwg Health Board v Morgan [2018] ICR 1194*** has indicated, the ***Selkent*** principles remain very much intact but as Lord Justice Leggett said in his judgment in that case at paragraph 19 , when reviewing the authorities including the case of ***British Coal Corporation v. Keeble*** which I will be coming to shortly in terms of the extension of time generally , he said this:-

"That said factors which are almost always relevant to consider when exercising any discretion whether to extend time are (a) the length of, and reasons for, the delay and (b) whether the delay has prejudiced the respondent (for example, by preventing or inhibiting it from investigating the claim while matters were fresh)".

43. That clearly is what has happened in this case and that seems to me to be a further reason why this amendment should not be permitted.

44. In addition to that I do bear in mind what the claimant would be losing by this decision, and it seems to me that she would be losing very little. She has already pleaded the facts of what happened in January 2015 and as I hope was made clear to her at the outset of this hearing , not permitting amendments to bring claims is not the same things as not allowing evidence to be given about certain facts, she has already pleaded , by way of background in paragraph 5 of her original grounds of claim, these events. There is nothing to stop her relying upon those in terms of any subsequent claims going forward, they are pleaded as background and the evidence will doubtless be received on that basis. All the refusal of the amendment would mean is that she has no separate claim in relation to those matters if they were to be established . In terms of what that claim could be , as I understand it she makes no complaint of any financial loss arising out of that incident, there is nothing to suggest that she went off work and lost any money or anything of that sor.t So in terms of the value of that claim financially to her , whilst doubtless it would sound in an award for injury to feelings if established it would probably not be a very high one and in those circumstances what she loses by not being able to advance that as a claim is relatively modest, bearing in mind that that does not preclude the other claims she is making against the first respondent, and also bearing in mind the position of the second respondent , because as is observed by Mr Braier quite rightly this claim is sought against him personally, and perhaps somewhat curiously, only him personally. These claims are not advanced against the first respondent, I know not why that is the case , but it is indeed the case, so he is responding to these allegations as claims himself, and only himself. Weighing all those factors into the

balance , then as far as that application to amend is concerned in relation to the second respondent, I decline it , and that amendment is not permitted.

(ii) Amendment in relation to the third respondent.

45. I now come then to the claims in terms of amendment in respect of the third respondent . These are slightly different, in that what is sought to be added in his case is not so much a new claim, in that allegations are being brought which were previously background and are now being put forward as claims, but in his case there are some fresh factual allegations. It is right to say also that in his case there are some proposed amendments which to me appear little more than to elaborate upon the claims that are already made against him, but they are slightly different and slightly more nuanced then the amendment sought against the second respondent.

46. I will deal with them on that basis, and the first of them is the proposed amendment of paragraph 18 of the grounds of claim, because there the claimant seeks to amend to specifically allege that the third respondent did not organise a risk assessment to discuss the impact of her high risk pregnancy, which is a new factual allegation not contained in the original grounds of claim.

47. In terms of the other claims I have indicated previously in this judgment the proposed amendments are in relation to paragraphs 22, 23 and 24. They perhaps fall into the second category , in that they add to and elaborate upon the original claims , albeit allegation 24 now would seek to extend the period of time to include the 12 August 2017 and beyond, i.e. all the way up to the claimant's resignation on 6 April 2018.

48. In terms of the other proposed amendment which affects the third respondent, again, that is paragraph 46, which again refers to that period, but perhaps most importantly, contains these allegations: that in the relevant period the third respondent did not contact her to arrange contact during her maternity leave, and inform her of promotional opportunities on the team ; the third respondent's conduct formed part of the claimant's grievance and appeal that were not upheld.

49. Pausing there , that latter proposed amendment whilst not specifically saying so , relates to an opportunity that apparently arose during the claimant's maternity leave for a form of promotion or secondment, some form of temporary potential increase in remuneration which , had she been at work and had she been aware of she may have well applied for, and may well have got. Her complaint is that being off on maternity leave she did not know about that opportunity, another colleague in fact applied for and got it, but she did not find out about this until March 2018. In terms of "promotional opportunities" it appears that this phrase refers to that single opportunity.

50. In terms of the proposed amendment to the claims against the third respondent , again paragraph 73 is simply a proposal to be amended to include the whole of the period up until 6 April 2018.

51. In relation to this proposed amendment the position, in terms of previous complaint or grievance , is slightly different in that in the document of 14 November

2017 which I have referred to, which the claimant created initially in response to the OMP proposal , but became her grievance, she did in that document set out a number of matters . In particular , in relation to the third respondent Mr Wood's lack of communication , and lack of answers to her questions, and things of that nature this is to be found at pages 80 and 81 of the bundle. So those matters were raised within a relatively short period of time, certainly within some two or three months of the matters of which she was complaining, which were ongoing at that time , because she was complaining of an omission, a failure of Mr Wood to contact her. She does not refer to the promotion issue, but the reason for that is she did not know about it , so at that time she was unaware of that going on, and it may not even have happened at that time. It seems to have been January 2018 that it occurred . To some extent it must be acknowledged that in that document she did raise some of the matters which now form part of either of her original claim , or of the basis upon which she seeks to amend. In that document she does make reference to risk assessment, because she refers to the occupational health assessment which was carried out upon her. At the bottom of page 80 in the third bullet point, she says:-

"10th July. The occupational health assessment took place at my home when I spoke to the assessor about the lack of support received on my return and lack of risk assessment carried out for my pregnancy".

52. That much is mentioned, but one cannot read the rest of this document , or indeed anything that follows immediately thereafter, as being any formal complaint that Mr Wood had not actioned that risk assessment, but she does at least make reference to the risk assessment. Now again in terms of where and when the claimant then raised these matters again, it is in the grievance appeal of 16 February 2018 , where she makes extensive reference, not only to the OMP matter but also to the conduct of Mr Wood .At paragraph 26, page 119(d) , she says this: "ongoing lack of communication from Dave Wood" and she sets out a paragraph there, although again it must be said that there is no specific reference to this lack of risk assessment , nor is there to the promotion opportunity issue, but again the claimant's case is that she only found out about that in March 2018.

53. So in terms of this application to amend (or these applications as there are several paragraphs that she seeks to amend), the position is slightly different in that the events are more recent in terms of Mr Wood's involvement , or lack of it, and the allegations she makes against him. They go back to June 2017 but she seeks to amend to bring them forward to her resignation, or some time before that, but certainly far closer to the presentation of the claim on 20 February 2018, or the application to amend on the 3 June 2018.

54. In relation to this, the third respondent through Mr Braier says these two original claims are out of time, the ambit of the claims against Mr Wood is being extended, the claimant has in effect realised , when the response has been filed on behalf of the third respondent , that the time limit issues have been taken, and has sought to extend the ambit of her claims to include the period up until her resignation so as to circumvent the time limits, and have them considered to be within time. That is the purpose of these amendments , and the Tribunal should not accede to them, that there is greater prejudice to Mr Wood if they are allowed and indeed, that the claims as originally framed lacked particularity and there were a number of matters

which he indicated that they were difficult to respond to, but that the claims as originally put appeared to end in June 2017, but were now being extended.

55. The claimant in terms of her application says that , certainly in terms of the promotion issue , she did not know about that at all until March 2018 so could not have raised that any earlier. In terms of the risk assessment , she says that she raised that in the grievance , at least in November 2017. All these failures on Mr Wood's part were ongoing , and therefore her claims are either not out of time or if they are, that she should be permitted to bring them by way of amendment at this stage.

56. As I have indicated these are slightly different matters to those alleged against Mr Harrison, and we do now enter the territory of acts and omissions, and the issue of when the relevant time limits run from.

57. As Mr Braier submitted, and is indeed the law , in the case of an omission the time limit runs from the time when, either somebody does something which is inconsistent with something else , and so instead of doing something they do something else which shows they are not going to do the thing complained of or that was wanted , or , if they do nothing at all, the time runs from the date upon which or by which they ought reasonably to have done that which the claimant says they should have done. This is the effect of s.123(4) of the Equality Act 2010.

58. So it is rather harder to pinpoint , in the case of an omission, when an omission is said to have occurred, and when the time limit would run from. In relation to the risk assessment , I do take the point that that was something that was not going to go on indefinitely , and the claimant effectively seeks to argue that the omission to carry out a risk assessment carried on right up until her resignation, in a sense she is right , factually . But legally it seems to me the time limit in relation to that omission cannot just drag on indefinitely until her resignation, time must start to run from the point within a reasonable time of when the risk assessment should have taken place . As it seems that by June, or possibly July of 2017 at the latest when she went off initially sick but then it was discovered that her sickness absence was pregnancy related and she would not be returning, no risk assessment was likely to be carried out thereafter . The time for carrying it out would then have expired, and so any time for carrying it out in terms of any time limits would have expired, certainly well before the grievance of November 2017. It is also significant, it seems to me that the claimant is not saying in that document that she still wanted a risk assessment, she is referring in that document to historical failings on the part of Mr Wood in relation to the period from 5 June , and indeed from 11 August in response to various queries that she expects him to answer, but she is not saying in that document "I am still waiting for a risk assessment". It seems to me the reason for that is that she would not be so at that point. So certainly by 14 November the date for any question of omission, and any time limit running for that omission would be then, at the latest and possibly sooner.

59. The significance of this is to the extent there is an application to amend specifically to refer to the risk assessment, which is paragraph 18 of the proposed amendment , then that would indeed be out of time.

60. In relation to the other matters, it seems to me that this is rather less clear and whilst I accept that the claimant cannot simply run those claims forward right up to the date of her resignation , I do consider that , given that there seems little issue but that after a certain point there was no contact between Mr Wood and the claimant, Tribunal may well want to investigate why that was.

61. The claimant alleges that this conduct, lack of contact, is discriminatory. It may or may not have been , but I can see an argument as to whether that period of silence such as it was, is potentially an act of discrimination or has a more innocent explanation. To some extent , gauging when any time limit may have arisen requires an examination of when any duty upon the third respondent to contact the claimant during the period of her absence may have arisen, which will be fact sensitive.

62. So it seems to me these amendments fall into three categories, the first , in relation to paragraph 18 of the proposed amendments in relation to the risk assessment, the second , in relation to the generalised allegations of lack of contact, and the third, is in relation to the "promotion opportunity" allegation.

63. In terms of the respondent's response in relation to those, whilst taking the point that two would appear to be out of time, the issues are potentially far less clear cut. The risk assessment is, I am satisfied, a claim that would be out of time on any view , and in relation to the fact that that was not formally grieved about until 16 February 2018, and perhaps not even then, that I would hold that in relation to the risk assessment amendment that should not be permitted, that is a specific new factual allegation, it has not actually even made into the amended paragraph 73 which does not relate to it at all, although the claimant said it was "an example". I am afraid the Tribunal should not deal with claims made by way "of example". If there is to be a specific pleading or allegation of a failure to act in respect, in this case, of a risk assessment it should be made, and if it is not made cannot just be put in "by way of an example in a claim at paragraph 73".

64. In relation to the risk assessment amendment, paragraph 18, I would say that given that the claimant did not grieve about that, that it was a matter that was not investigated and was not evenly formally raised in the 16 February 2018 grievance, then that is not a matter that would be right to allow to proceed , and I will not allow that amendment. I would add that I do not consider this deprives the claimant of anything significant, as other than as an element in any claim for injury to feelings, no financial claims flow from this alleged failure.

65. In relation , however, to the other proposed amendments in relation to the third respondent , those seem to me to be far harder to categorise as being out of time because one needs to know rather more about them, and the respondent's response to them. I would on that basis be prepared to allow the amendments to this extent , and it seems to me that the latest any such complaints could be considered would be up until the date of the grievance appeal on 16 February 2018, when the claimant then put that in. It may well be that any time limit expired earlier than that, but I certainly do not think that the claimant could complain, and seek to amend in relation to any acts or omissions of the third respondent in any period after that date.

66. I will therefore allow these amendments to the extent of paragraphs 24, 46 and 73 , only up until the 16 February 2018. I am not thereby, however, finding that any such claims would be in time , it will still be open to the respondent to plead when further details are provided , and disclosure in particular has taken place, that any of those claims were in fact out of time.

67. So , substantively the second and third respondent could still plead that in response , and by giving permission to amend I am not holding that those claims would be in time.

68. The third category is in relation to the "promotion opportunity". I will allow an amendment in respect of that , but that is a singular and not plural, as the claimant I think puts on the grounds promotion opportunities. There has only been one identified , but on the basis that the claimant was not aware of that until March 2018, then I think balancing all the relevant factors under the ***Selkent*** principles , given that she had raised certainly in the original grievance in November 2017 issues of a similar nature , i.e lack of contact or consideration, that the prejudice to the third respondent of this matter proceeding by way of an amendment is relatively minimal, and on that basis I will allow those amendments in those limited terms.

The time limit issue in relation to the claim relating to December 2016 as originally pleaded against the second respondent.

69. I come now to the next issue to be considered by the Tribunal, and that is in relation to the existing claim against the second respondent in relation to the events of 10 December 2016 , which has always been pleaded against him as a complaint of direct or harassment discrimination and in respect of which the Tribunal is invited to hold that it has no jurisdiction on the basis that that claim was presented out of time , and that the Tribunal should not extend the time for its presentation. That is a substantive determination , not a strike out as such, although the effect is largely the same.

70. in relation to this, the issue is fairly straightforward in terms of whether the claim was presented in time , in that, clearly going back to the 10 December 2016, when it was presented in the claim form on 20 February 2018 it was considerably out of time. There is no issue in relation to that, save for the argument in relation to conduct extending over a period of time.

71. Now for this matter, as indeed for the amendment , in relation to any argument that the 10 December 2016 matter could form part of conduct extending over a period of time , for the reasons I have already given in relation to the amendment application for the January 2015 incident amendment, the same applies to the 10 December 2016 allegation. I cannot for the reasons already given consider this capable of forming conduct over a period of time when considered with the OMP matter in August/September of the following year , which is conceded to be in time. I cannot save the claim from December 2016 in terms of the claim being in time by virtue of s.123(3) on the claimant's pleaded case. The length of time between the two claims, and the wholly different nature of them , as previously discussed even assuming (as is strongly disputed , which is the basis for the deposit order application) that the second respondent was in fact responsible for the OMP issue,

lead me to conclude that the earlier claim could not reasonably be considered as part of a course of conduct extending over a period of time.

72. In terms of the conduct over a period of time I should also perhaps say this because the claimant did refer me to the ***Veolia Environmental Services UK v Gumbs [UKEAT/0487/12/BA]*** authority , and I should deal with that . Recapping upon that case, it is where the personality of the individual (in this case the same person Mr Harrison) being involved in both , or all three , if one takes it back to January 2013 , acts complained of may be relevant. One appreciates how the claimant sought to advance that as a factor in favour of a finding that this be held to be conduct extending over a period of time, and I do take that on board. It does not detract I am afraid from my findings in relation to the nature of the conduct i.e. the mere fact it is the same person who perpetrated it. Even if he was, I do not find the fact that the same person was involved in all three acts , of itself, is sufficient to make it conduct of the nature required for the section, so that would still be my finding , even taking into account the ***Gumbs*** decision.

73. So again, I have to consider in this context the Tribunal's discretion, that is not the discretion to accept an amendment, but the discretion to extend time under the just and equitable principles . These again have been well examined , and considered over the years in the various cases that have looked at this matter , and again it being a matter of discretion , the Tribunal is given guidance as to how to approach these matters which again over the years has been repeated and accepted in many cases. The starting point is that in terms of this discretion in ***Robertson v. Bexley Community Centre [2003] IRLR 434*** which is in the bundle of authorities that Mr Braier has put forward , it has long been held , and again been upheld in the following cases, that the exercise of the discretion to extend time is not a right, there is no presumption in its favour , and indeed the exercise of the discretion is the exception rather than the rule . So the Tribunal has to, as it were, be persuaded as to why it should exercise that discretion in favour of a claimant who seeks it.

74. In terms of the principles to be applied in respect of that discretion, they were laid out a long time ago in ***British Coal Corporation v. Keeble [2997] IRLR 336*** where, by analogy with applications to extend time for presenting personal injury cases under the Limitation Act 1980 , by analogy with that the circumstances to be taken into account, were , but again this is not an exhaustive list but they were the significant ones :

they are the length of and reasons for the delay;

the extent to which the cogency of the evidence is likely to be affected by the delay;

the extent to which the party sued had cooperated with any request for information;

the promptness with which the claimant acted once he or she knew of the facts giving rise to the cause of auction;

the steps taken by the claimant to obtain professional advice once he or she knew of the possibility of taking action.

Those , as I have said, are not exhaustive but they are certainly factors that a Tribunal should have regard to, and any others in a case depending on the circumstances and as indeed the ***Morgan*** case I referred to before is in fact a case on the extension under this principle . As I indicated previously the judgment of Lord Justice Leggett emphasised how the two frequently referred to factors are the length of and reasons for the delay and the prejudice caused by the delay . They are not the only factors but as he points out there they are very important ones.

75. Returning to the particular claim from December 2016, and whether the discretion should be exercised, the length of the delay of course is considerable, because we have from the end of December 2016 to February 2018, the reasons for that delay the claimant has again , rather similarly to her explanation of the January 2015 incident explained how she did not want at that time to take it any further, she did not wish to challenge the Chief Executive of an organisation in which she was a junior person, she also of course had maternity to concentrate upon and so, for all those reasons, she accepts she did not make a formal complaint at the time . These were the reasons why she did not take it further then, and hence it was not until 16 February 2018 , again in that same document, the grievance appeal letter that she formally raised these matters.

76. Looking carefully at that document has been instructive, in my view, because it seems to me relevant to consider the context , and perhaps the reasons why, the claimant put forward this allegation and indeed the January 2015 one. It seems to me significant that at paragraph 34 of that document, she starts that paragraph by setting out why she believed it was reasonable to assume that Matthew Harrison would be responsible for signing off the OMP proposal. It is to be remembered that her initial grievance of November 2017 , of course, was prompted by that decision of the first respondent, and its attempts to recoup the payments from her. She responded to this with that grievance, which set out a number of matters we have already referred to, including matters relating to Mr Wood.

77. But it was not until February 2018, when she has had the outcome of the grievance , in relation predominantly to the OMP matter, in which she has been told that Mr Harrison was not responsible for signing off those proposals, that she then refers to these matters. She ends this paragraph by saying “I believe this is in retaliation for two prior incidents that were reported”. So the context in which she is raising this , it seems to me, is very much in the context of the OMP recoupment decision, and the first respondent’s contentions to her that Mr Harrison was not involved in it.

78. So, rather than being complaints in their own right that she wished to pursue, and to bring separate claims , it seems to me to be evidence from which she sought (perfectly permissibly, of course) to impugn the assertion that Mr Harrison had not been involved in the decision to deny her OMP . That does seem very much the context in which these allegations were first made, and certainly first made formally, which seems to me to be of some significance.

79. As to why these matters were not raised previously, we have discussed this, but going on to consider the other factors in the discretion, of course, one has to consider the balance between the parties . In particular noting again that this

allegation, in relation to December 2016 (or set of allegations as there were slightly more conduct alleged) this an event which took place, undocumented between a number of people which was in a social context, everyone seems to agree and consequently will rely upon the recollection of witnesses and parties to it.

80. Again, rather like the January 2015 amendment application, this is not something that is going to be well documented, this is something that is going to depend on people's recollection on events that took place a long time ago, and which were relatively short lived .I accept that the claimant says she reported it to Alison Folkes but thereafter no further investigation was undertaken, certainly nothing formal. One does not even know , of course, if Alison Folkes actually raised this with Mr Harrison, although she may have done. The upshot of this is that here again is a stale allegation, which the claimant did not pursue at the time other than informally referring it to Alison Folkes, which she was content to leave at the time but which only surfaced again in the context of the grievance she wished to raise in relation to the OMP matter.

81. In terms of the second respondent , however, this is a claim that he faces alone, it is not one made against the first respondents, it is made solely against him and relates to this particular incident . So we have very similar considerations, it seems to me as we had in relation to the January 2015 amendment application, we have an old , short – lived, purely verbal , undocumented and witness dependent incident , that has not been investigated until long after the event. Whether people say they can recollect it or not, one can anticipate in the Tribunal that if someone says they cannot remember they will be challenged, and if someone says they can then their recollection will be challenged on the basis it is so long ago.

82. There is a reason why discrimination claims of this nature have a three-month time limit. It is to ensure that matters of this nature, which very often depend upon people's recollection of events that are not documented, but require people to give accounts of events that happened in their working lives, need to be ventilated before a Tribunal as soon as possible , that the three month time limit exists. That is another reason why the discretion is exercised sparingly, and in this case I am satisfied that the reasons for the delay are not terribly good ones, the claimant I accept made choices at the time , but clearly she was content to leave things as they were at the time, she did not pursue it further until the matter with the OMP and the grievance outcome arose. The first Mr Harrison knew of it , formally, would be when the investigation then started after February 2018 , as indeed would be the case for the other witnesses. Whilst appreciating that people have been able to recollect certain things , and may say this and may say that, that is a far from satisfactory basis upon which to start investigating , so long after the event, these very stale events.

83. So for those reasons, and bearing in mind again that this is a relatively minor matter it seems to me , it should be considered in the context of the claimant's main claim which is against the first respondent . This evidence may well be relevant, and indeed she relied upon it in paragraph 34 of this document as an explanation as to why Mr Harrison may have taken some involvement in the OMP matter that he did. Nothing in removing this as a claim , as it is one that is out of time, will prevent her putting this evidence forward, but for all these reasons it seems to me that this is a case where the discretion should not be exercised to extend the time for

presentation of this claim which is out of time. The Tribunal will not exercise its discretion to extend time , and consequently it has no jurisdiction to entertain the 10 December 2016 claim against the second respondent.

The time limit issue in relation to the claim as originally pleaded against the third respondent.

84. That then brings me to those issues in relation to time limits in respect of the third respondent , and the position here is also somewhat more nuanced because of the amendments that I have allowed. Mr Braier in his skeleton did acknowledge that there may be some consequences of this nature in paragraph 31 onwards he deals with this matter here, at 32 where he says: "*if contrary to the third respondent's submissions the amendments pleaded and the amended grounds were allowed to be made it is accepted for the purpose of this PH that those matters formed part of a prima facie continuing act with the proceeding allegations against the third respondent and accordingly it is the last of those acts which sets the date for determination of whether or not the claim against the third respondent was brought in time.*"

85. As that rather anticipates, it seems to me that unless and until the amended claims against the third respondent are determined in terms of exactly when time would begin to run in respect of the last act, or omission., and in particular given the status of that claim relating to the promotion issue which if the claimant did not know about it until March 2018 , this may well give rise to the application of the just and equitable extension in respect of that claim. It seems to me premature to seek to determine whether any of the claims , as now amended , against the third respondent are out of time and if so, whether they should be allowed to proceed. Again that is not to preclude that argument being raised at the final hearing , but it seems to me that on this application now that the goal posts have slightly moved in respect of the third respondent , so that I could not say with confidence today that the claims, as amended , are out of time and with even less confidence that the discretion should not be exercised. So those are matters that will have to go to the final hearing , unless, of course there is a further preliminary hearing once they are clarified . Certainly at the moment I do not accede to any application to strike out any matters against the third respondent on any time limit basis or to determine that the Tribunal has no jurisdiction.

The deposit order applications.

86. I can finally turn to those applications, and they, of course, in relation to the second respondent relate to what is , now, the remaining claim against him, namely his alleged involvement in the OMP matter. In respect of this the application is made pursuant to Rule 39 of the Employment Tribunals Rules of Procedure 2013 which provides that at a Preliminary Hearing if a Tribunal considers that any specific allegation or argument in a claim has little reasonable prospect of success it may make an order requiring the paying party to pay a deposit not exceeding £1,000 as a condition of continuing to advance that allegation or argument.

87. On behalf of the second respondent , the application is made on this basis. The claimant has claimed in her claims , as originally framed, or indeed as she

sought to amend , that the decision, or certainly the attempt made by the first respondent , to recoup payments of maternity leave that were made to her in respect of her first maternity leave period , which the first respondent accepts clearly were made, if then subsequently retracted , that the second respondent was in fact involved in those decisions . He was as it were, an influence upon those decisions , and so, as she puts it in the original claim, at paragraph 37, his actions in directing the first respondent to deal with the claimant in that manner , which refers back to the previously pleaded allegations against the first respondent, were discriminatory.

88. The second respondent is the Chief Executive Officer of the first respondent, and he has made a witness statement in which he deals with this matter. It has not been tested in cross examination, of course, but at paragraphs 13 to 17 he denies this allegation , and says basically that this was entirely run, as he puts it, by the first respondent's HR department, he had no involvement in the investigation or the conclusions of that team , and he did not exert any influence over the decision made. The claimant , of course, does not accept that and indeed as we have been seeing from the grievance appeal letter of 16 February 2018, did not accept it then when that was the outcome from the first grievance.

89. It has been repeated , of course, as a finding in two respects, first of all and we will come in more detail to this in a moment by Sharon Griffiths, who was the HR Consultant appointed to deal with the claimant's grievance appeal and whose report we have at page 114 onwards. That was her conclusion, it has been reiterated in a letter from Mr Davison who is the Chairman, who wrote to the claimant with the outcome of her grievance on 25 May, page 126A of the bundle in which he says expressly that he wanted to emphasise and this is by the second hole punch "the key finding that there was no connection whatsoever between the informal complaint that the claimant raised regarding Mr Harrison in December 2016 and the company's decision in relation to OMP". He continued "all decisions in this regard were taken by the dedicated and director led HR department in conjunction with advice from the companies Employment Solicitors and Matthew Harrison was not involved in this at any stage". He continues that legal advice was sought because the claimant's situation was unique and complex, not because the company believed it was in the wrong, that Mr Harrison did not have oversight on every matter when the company referred to its external advisors, the HR team had a legal budget and was free to spend as the need arose without having to obtain approval from Mr Harrison, or indeed anyone else. That is repeated , in briefer terms, in the first respondent's response where they expressly plead that the second respondent was not involved in the decision to seek to recoup the maternity pay.

90. On that basis , submits Mr Braier, the claim that the claimant seeks to make against the second respondent is really a speculative one, everything that she has had so far, in terms of the investigation that has been carried out , and the documentation that has been provided has failed to support her suspicion that the second respondent was indeed involved in this decision, and any attempt to recover this money. It is, he submits, a classic case of , borrowing from the judgment in ***Patel v Lloyds Pharmacy Ltd [UKEAT/0418/12/ZT]*** , a claimant hoping something will turn up , but not really having any realistic prospects of success . The claimant is effectively bringing a speculative claim , in the hope rather than the legitimate

expectation that she will obtain some evidence, which at the moment he submits she does not have.

91. The claimant would oppose that, and says that is not the case, she relies, as indeed she did in her grievance appeal, upon Mr Harrison's previous conduct towards her , which as I have said is in the evidence and it is part of the allegations, if not the claims now, but she seeks to rely upon that as being evidence of what one might call a disposition or inclination, I suppose, to treat women less favourably and possibly to treat her in particular less favourably. Against that background and the absence of anything else she has seen which satisfies her that he was not involved, she says that she should be able to maintain this claim against him without the imposition of a Deposit Order upon her.

Discussion and findings.

92. In terms of the test to be applied, it is a relatively straightforward one, one follows the words of the rule , and that is a question of whether the claim has little reasonable prospect of success, which is not as high a hurdle as the strike out provisions , which require it to be shown that the claim has no reasonable prospect of success. So there might be an argument, but in cases where the Tribunal is satisfied that it is not much of a one , and that the claimant does not have much prospect of success , and only a little reasonable one then, it is entitled to consider making the Deposit Order that is sought.

93. To some extent the respondents , of course, and Mr Harrison says that he is trying to prove a negative - "I was not involved, how many times do I have to say it, I was not involved" , and so the onus he says effectively shifts to the claimant, saying "well you show how I was". The claimant at the moment is not in a position to do that, other than effectively to say he must have been, by dint of his position as CEO.

94. One takes that on board, and perhaps also his previous (alleged) dealings with her, but in terms of the evidence before the Tribunal at the moment, it seems to me that the investigation carried out by Ms Griffiths and her findings are important. We do not have a witness statement from Ms Costigan, at the moment, although obviously in due course the first respondent may conclude that that is an important document , and we only have Mr Harrison's witness statement, but what Ms Griffiths found is perhaps instructive because, if it not the evidence as such, it might be a good indication of what the evidence is likely to be . She deals with this at paragraphs 109 onwards of the report of her findings, which start at page 162 of the bundle . There she says that she is investigating what, if anything the matters the claimant was alleging in relation to Mr Harrison, bearing they had on the decisions taken in respect of her entitlement to OMP. She says specifically she wanted to establish whether Mr Harrison had been actively involved in the decision making process, or had been consulted informally about the case and if so, whether he harboured any feelings of personal antipathy towards the claimant that may have clouded his judgment , and thereby biased his input. Then she sets out on the next page , at paragraphs 110 onwards, her investigations and how she has had interviews with Mr Harrison, Nicola Parkinson and Sarah Costigan from Human Resources . She says:

"It is very clear that the decisions regarding Stephanie's OMP were taken by Nicola and the Human Resources Team and that Mathew had no involvement whatsoever, Nicola explained that whilst Stephanie's situation was highly unusual and indeed unprecedented within Great Places which was what prompted Sarah to seek expert legal opinion, this remained at all times a purely operational manner and not one about which Matthew's input needed to be sought or was sought".

She goes on to say how that satisfies her in relation to this complaint, but she continues to set out some more detail about the OMP provisions in general , and how they had affected employees in general , not perhaps just the claimant, but how they may have been applied or interpreted in the past and in particular the expectations that may have been raised.

95. But in terms of this particular issue, at the bottom of the page one will see at paragraph 114 (page 163 of the bundle) , she says this:

"As regards why legal advice was sought Sarah Costigan explained that Stephanie's sickness absence following her brief from her first period of maternity leave on 5 June 2017 was dealt with by one of the HR Advisors as normal"

and she goes on to detail how the claimant was initially signed off sick , but then thereafter the organisation became aware that the condition was pregnancy related. She goes on in paragraph 115 to refer to the policy and its provisions about return to work, but the next paragraph is perhaps the most significant, where she says this

"Sarah explained that she became involved in Stephanie's case when it became clear that Stephanie would be on long term sick leave, that her absence would probably continue through to the start of her second period of maternity leave, in August 2017 Sarah sought advice from Fiona Chadwick about Stephanie's eligibility for OMP for her first maternity leave as she would not fulfil the accompanying conditions; Sarah stated, "this was a very unusual situation, one we have never had before and I wanted to take advice".

96. Pausing there, the name Fiona Chadwick of course appears as the representative of the first respondent at the end of their ET3, and Fiona Chadwick is therefore presumably is the first respondents lawyer, or one of them, so that is presumably a reference to that legal advice. What this paragraph, and indeed the rest of the report through to 117 on that page tends to suggest is that the only evidence at the moment is to the contrary of what the claimant asserts. She may have criticisms of Ms Griffith's investigation , but we have got details of it and we have got details of what she was told. That is not, I appreciate , the evidence, it is not the full witness statements of the relevant persons , and in due course the Tribunal may hear from Ms Costigan. But in terms of looking for any evidence to support the claimant's contentions that Mr Harrison was somehow involved in the decision to seek to recoup the maternity pay she had previously received, one struggles. One is therefore left with this position , and that is that whilst the claimant clearly had the suspicions and the concerns which she voiced in her grievance and which she maintains in her claims against Mr Harrison in these claims. Ms Griffiths has looked into those and has interviewed at least two of the relevant witnesses (if not three),

and this is what she has been told. As I say that is not the evidence , but it is a good indication of what the evidence is likely to be.

97. On that basis, in the absence of the claimant being able to point to anything else at this stage, I am persuaded that her claims in relation to the second respondent and his involvement in the decision to recoup OMP do indeed have little reasonable prospect of success. I do not say , and I am not invited to say "no reasonable prospect", but at the moment all the indications are to the contrary and unless and until the claimant comes up with (and that does rather echo the phrase from ***Patel***) something more, it looks unlikely that she will succeed. That rather reinforces Mr Braier's argument that in a case where someone is waiting to see what turns up , that is precisely the sort of situation which the Tribunal should consider making a Deposit Order. I do, and subject to any further addresses on the amount then I am minded in fact to make a Deposit Order, and I will hear further argument on what amount is sought or agreed.

98. That leaves only the application made similarly by the third respondent in terms of prospects of success in relation to his claim, as originally put of course in Mr Braier's skeleton argument, this was based very much on the claims as they were and he rightly sets out their issues in relation to the periods that had been pleaded up until 11 August 2017, and one takes that on board. Again I am afraid the goal posts have slightly moved , in that whilst what he says there may have some bearing in relation to that period , the claimant's claims have now moved to a later period and at present I cannot say any further than that I think it would be very difficult to say what prospects of success those amended claims have, and so I do not find in relation to the amended claims against the third respondent that the claimant has little reasonable prospect of success and so, I decline to make a Deposit Order in respect of those claims.

99. There ensued a further discussion with the claimant as to whether she wished the Tribunal to take into account her means when determining the amount of any deposit order. She said that she did , and the information that she provided the Tribunal was that there was an monthly shortfall between her outgoings and income of some £400. No documents or further details were provided, and the point was made by the respondent that capital and saving should also be considered. Upon invitation by the Employment Judge to state a figure which she felt was appropriate, the claimant declined to do so, expressly leaving it to the Tribunal to fix the figure.

100. In determining the amount of the deposit order, the Tribunal does take into account that the claimant is of limited means at present, but that she has previously been employed, has an earning capacity, and is likely to be able to raise a modest sum if ordered to pay a deposit. In the circumstances, the Tribunal considered that a more than token amount should be ordered, but one which should not be beyond the claimant's ability to fund. The sum of £200 is accordingly the amount of the deposit that will be ordered.

101. Mr Braier wished it to be made clear to the claimant that the main effect of a deposit order was that it was a "shot across the bows", as it were, as to the likelihood of an award of costs if the claims to which the deposit order relates should subsequently fail at the final hearing. The claimant is doubtless so aware.

Further Case Management.

102. Miss Smith subsequently re-joined the hearing for the first respondent, and the case management orders set out above were then made with all parties present. Given the slight delay in promulgation, the Tribunal has slightly extended the date for provision of further particulars by the claimant.

Employment Judge Holmes

Dated : 27 September 2018

JUDGMENT AND REASONS SENT TO THE PARTIES ON

27 September 2018

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FOR THE TRIBUNAL OFFICE

[JE]